Supreme Court, U.S.
FILED
SEP 28 1978
MICHAEL RODAK, JR., CLERK

No. 78-218

In the Supreme Court of the United States

OCTOBER TERM, 1978

CARBON FUEL COMPANY, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-218

CARBON FUEL COMPANY, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

Petitioner contends that the court of appeals erred in construing the administrative review provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*, which provisions have been superseded by subsequent legislation. Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 *et seq.*

1. Petitioner operates several coal mines in a mountainous area near Winifrede, West Virginia, and maintains a bathhouse two to three miles away from the various mine portals for the use of the miners (Pet. App. 26a-27a, 30a). On May 22, 1975, a federal coal mine inspector issued a notice of violation to petitioner under Section 104(b) of the Federal Coal Mine Health and

Safety Act of 1969, 30 U.S.C. 814(b) ("the 1969 Act"), charging that the bathhouse violated a mandatory health standard because it was not "centrally located so as to be * * * convenient for the use of the miners * * *." 30 C.F.R. 75.1712-2. The notice required petitioner to abate the violation—*i.e.*, to construct a new bathhouse convenient to the mine portal that was three miles away from the existing bathhouse—by June 23, 1975 (Pet. App. 29a).[1]

On June 2, 1975, petitioner sought administrative review of the unabated notice of violation under Section 105(a)(1) of the 1969 Act, 30 U.S.C. 815(a)(1), claiming that the location of the existing bathhouse did not conflict with the regulation (Pet. App. 24a). The Secretary granted review in accordance with his general practice.[2] On July 22, 1975, after an expedited hearing in which respondent United Mine Workers of America (UMW) intervened to defend the inspector's notice, the administrative law judge ruled that the location of the existing bathhouse complied with the mandatory health standard (Pet. App. 23a-36a). Accordingly, the judge set aside the inspector's notice of violation (Pet. App. 36a). This ruling was affirmed on February 20, 1976, by the Board of Mine Operations Appeals (Pet. App. 16a-21a), and thereby became the final decision of the Secretary of the Interior.

---

[1]A second notice, concerning a mine located eight miles from the existing bathhouse, was not challenged by petitioner and is not at issue in this case (Pet. App. 28a).

[2]Meanwhile, the original abatement time specified in the notice of violation was extended to July 25, 1975, in order to permit the operator to obtain administrative review prior to constructing a new bathhouse (Pet. App. 26a).

Respondent UMW filed a petition for review in the court of appeals under Section 106 of the 1969 Act, 30 U.S.C. 816, contending that the Secretary (acting through his adjudicative delegates, the administrative law judge and the Board of Mine Operations Appeals), had no jurisdiction to vacate the inspector's notice of violation. The UMW also argued that, assuming the Secretary had properly reviewed the notice of violation, he erred on the merits in finding that the location of the bathhouse complied with applicable regulations. Petitioner intervened in the proceeding in support of the Secretary's decision.

The court of appeals reversed. It agreed with the UMW that Section 105(a)(1) of the 1969 Act, 30 U.S.C. 815(a)(1), limited administrative review of an unabated notice of violation to the question whether the time allowed for abatement was reasonable and that the section thus precluded immediate review of the question whether a violation existed (Pet. App. 9a-13a). The court construed the 1969 Act to require a mine operator who received a notice of a violation but believed that its operations were in full conformity with all applicable health and safety standards "either to abate the condition or to await transformation of the notice to a withdrawal order by a failure to abate, at which point [it] would have finally been entitled to challenge the existence of the violation" (Pet. App. 13a-14a; footnote omitted).

2. After a thorough review of the language and legislative history of the 1969 Act, the court of appeals concluded that a mine operator served with a notice of violation of mandatory health and safety standards that does not pose an imminent danger is compelled, if it chooses not to alter its operations, to subject itself to a withdrawal order—an order requiring it to withdraw

employees from the violation area—before it can obtain administrative review of the question whether the inspector correctly determined that a violation existed.[3] This holding finds some support in the wording of Section 105(a)(1) and in portions of the congressional reports. Moreover, the court's construction avoids subjecting "miners to continuing their labors—perhaps for a substantial period—under conditions which, though not thought to be imminently dangerous, were nonetheless believed to be unwholesome and in contravention of the Act's health and safety standards" (Pet. App. 14a; footnote omitted). On the other hand, the court of appeals' interpretation of the administrative review provisions of the 1969 Act works some hardship on mine operators, who may have to undertake unnecessary and perhaps costly improvements merely to be entitled to challenge the validity of a notice of violation, and it is inconsistent with the construction of the statute, albeit in *dicta,* by two other circuits. *Kanawha Coal Co.* v. *Andrus,* 553 F. 2d

[3]Review of the merits of the violation determination is clearly available under Section 105(a)(1) of the 1969 Act, 30 U.S.C. 815(a)(1), once a withdrawal order has issued under Section 104(b), 30 U.S.C. 814(b), for failure to abate a violation within the period fixed by the notice or by subsequent extensions (Pet. App. 13a-14a). Review of the merits is also available in a civil penalty proceeding under Section 109(a)(3) of the 1969 Act, 30 U.S.C. 819(a)(3), but such proceedings customarily take place after the violation has been abated, since the Secretary, in assessing the penalty, is required to consider "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation" (Section 109(a)(1), 30 U.S.C. 819(a)(1)). In any event, under the plain language of Section 104(b), a withdrawal order must issue upon the operator's failure to abate the violation totally within the permitted time, without regard to whether a civil penalty proceeding had been instituted.

361 (4th Cir. 1977); *Lucas Coal Co.* v. *Interior Board of Mine Operations Appeals,* 522 F. 2d 581 (3d Cir. 1975).[4]

3. Whatever the proper interpretation of Section 105(a)(1) of the 1969 Act, there is no reason for this Court to grant review here. The 1969 Act has been amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 *et seq.* ("the 1977 Act"), which became effective on March 9, 1978, and Section 105 of the 1969 Act has now been superseded by administrative review provisions in the new

[4]The issue in *Kanawha* was whether the adequacy of an abatement plan was subject to administrative review. The Fourth Circuit agreed with the Secretary that the adequacy of the plan was not immediately reviewable, but it observed that the operator could proceed with its plan and, if the Secretary issued a new notice alleging that the plan did not abate the violation, the operator could then seek review of the question whether a violation existed (553 F. 2d at 363). The court also stated (*ibid.*) that if the Secretary should issue a "closure" (withdrawal) order before the operator was able to obtain a hearing on the new notice, the operator could apply to the court for a stay of the order. In *Lucas,* the Secretary reviewed the merits of unabated violation notices but declined to terminate the notices, finding that the inspectors had correctly determined that violations existed. None of the parties in the court of appeals challenged the Secretary's jurisdiction, and since the court upheld the decision against the mine operator on the merits it had no occasion to consider whether the operator had been entitled to immediate administrative review. In reviewing another issue (whether abatement moots a notice of violation), however, the court discussed the statutory review scheme and stated that "the fact of violation is subject to section 105 review where the violation remains unabated" (522 F. 2d at 587).

A third court has suggested that a construction of Section 105 that prohibited immediate review of a notice of violation would raise serious problems under the Due Process Clause. *Lucas* v. *Morton,* 358 F. Supp. 900, 903-904 (W.D. Pa. 1973) (three-judge court). The court below did not address the constitutionality of the statutory scheme (Pet. App. 14a n.55).

statute. We know of only one pending case arising under the 1969 Act that might be affected by the holding of the court below,[5] and the effect of this holding on cases arising under the 1977 Act is speculative. As petitioner points out (Pet. 14-15), some administrative law judges, in cases somewhat similar to the present case, have followed the court of appeals' ruling in determining the scope of administrative review of violation notices (termed "citations") under the applicable provision of the 1977 Act, Pub. L. No. 95-164, Section 201, 91 Stat. 1305-1306.[6] Those decisions, however, are subject to discretionary review by the Federal Mine Safety and Health Review Commission, the independent adjudicative body established by Section 201 of the 1977 Act, 91 Stat. 1314, and thereafter by the courts of appeals.[7] At this time, neither the Commission nor any court has addressed the question whether the different language of the administrative review provision in the 1977 Act represents a substantive change from Section

[5] *Mullins* v. *Andrus*, petition for review pending, No. 77-1086 (D.C. Cir.).

[6] In the cases cited by petitioner, the violations had been abated, and the operators were seeking review of the merits of the citations prior to the institution of civil penalty proceedings.

[7] The Commission, including its administrative law judges, now exercises the administrative review functions performed by the Secretary of the Interior through his adjudicative delegates under the 1969 Act. The administrative law judges formerly assigned to the Office of Hearings and Appeals in the Department of the Interior were automatically transferred to the Commission upon the effective date of the 1977 Act. The Secretary of Labor, rather than the Secretary of the Interior, is now responsible for enforcement of mine safety and health standards. See Pub. L. No. 95-164, Sections 102 and 201, 91 Stat. 1290-1291, 1313-1315.

105(a)(1) of the 1969 Act.[8] Until the review section of the 1977 Act has been construed by the Commission and the lower courts, there is no need for this Court to consider the question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1978

[8] The court of appeals correctly noted (Pet. App. 3a n.3) that it had "no call to construe the 1977 Act" since that statute was inapplicable to the present case.

DOJ-1978-09